

NTSB Order No. EA-4972

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 17th day of May, 2002

Docket SE-16375

The respondent has appealed from the written decision Administrative Law Judge Patrick G. Geraghty issued in this proceeding on October 24, 2001.¹ By that decision, the law judge sustained the Administrator's allegation, in an emergency order of revocation, that respondent had violated section 65.23(b) of the Federal Aviation Regulations ("FAR," 14 CFR Part 65).² For

²Respondent waived the expedited procedures applicable to an

the reasons discussed below, we will deny the appeal.³

The Administrator's July 13, 2001 Emergency Order of Revocation alleged, among other things, the following facts and circumstances concerning the respondent:

1. You are now, and at all times mentioned herein were, the holder of Mechanic Certificate No. 1690512, with Airframe and Powerplant ratings, issued under 14 C.F.R. Part 65.

2. At all times mentioned herein, you were employed to perform aircraft maintenance or preventive maintenance duties for Trans World Airlines, Inc. (TWA), the holder of an FAA air carrier certificate issued under Part 119 of the Federal Aviation Regulations, 14 C.F.R. Part 119, and appropriate operations specifications issued under Part 121 of the Federal Aviation Regulations, 14 C.F.R. Part 121.

3. At all times mentioned herein, an employee who performed aircraft maintenance or preventive maintenance duties for an entity operating under 14 C.F.R. Part 121 or 135 was performing a safety-sensitive function, as prescribed in 14 C.F.R. Part 121, appendix I, section III.

4. At all times mentioned herein, an employee performing a safety-sensitive function for TWA was subject to random drug testing under 14 C.F.R. Part 121, appendix I, section V.C.

5. On or about January 22, 2001, you received notice that you were selected for random drug testing required by 14 C.F.R. Part 121, appendix I.

(..continued)

emergency proceeding. FAR section 65.23(b) provides as follows:

§ 65.23 Refusal to submit to a drug or alcohol test.

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(b) Refusal by the holder of a certificate issued under this part to take a drug test required under the provisions of appendix I to part 121 or an alcohol test required under the provisions of appendix J to part 121 is grounds for—

(1) Denial of an application for any certificate or rating issued under this part for a period of up to 1 year after the date of such refusal; and

(2) Suspension or revocation of any certificate or rating issued under this part.

³The Administrator has filed a reply opposing the appeal.

6. At the time of the notification identified in paragraph five, you were instructed to report to TWA's designated collection site.

7. On or about January 22, 2001, you provided a specimen to Mr. Mitchell Grobeson, the specimen collector working at TWA's designated collection site.

8. During the collection process, you signed the Federal Drug Testing Custody and Control Form, making the following certification:

I certify that I provided my urine specimen to the collector; that I have not adulterated it in any manner; that each specimen bottle used was sealed with a tamper-evident seal in my presence; and, that the information provided on this form and on the label affixed to each specimen bottle is correct.

9. During the collection process, the specimen collector signed the Federal Drug Testing Custody and Control Form, making the following certification:

I certify that the specimen identified on this form is the specimen presented to me by the donor providing the certification [identified in paragraph eight, above], that it bears the same specimen identification number as that set forth above, and that it has been collected, labeled and sealed as in accordance with applicable Federal requirements.

10. On or about January 27, 2001, the analysis of the laboratory, LabCorp Occupational Testing Services, confirmed the presence of an adulterant in your specimen that precluded a valid drug test and reported, "TEST NOT PERFORMED," "Specimen adulterated: pH is too low."

11. On or about February 2, 2001, William F. Brath, M.D., a TWA Medical Review Officer, verified that a valid drug test could not be performed on your specimen by reason of adulteration of your specimen.

12. In a letter dated February 26, 2001, you acknowledged to FAA Inspector Ralph J. Gallegos that you used marijuana during the weekend preceding your random drug test and that you "tried to fool the [random drug] test."

13. At all times mentioned herein, 14 C.F.R. Part 121, appendix I, section II, provided that a refusal to submit to drug testing includes engaging in conduct that clearly obstructs the testing process after an individual has

received notice of the requirement to be tested in accordance with 14 C.F.R. Part 121, appendix I.

14. By adulterating your specimen, as described above, you engaged in conduct that clearly obstructed the testing process, as provided in 14 C.F.R. Part 121, appendix I, section II.

15. Because you engaged in conduct that clearly obstructed the testing process, your conduct constituted a refusal to submit to a drug test required under 14 C.F.R. Part 121, appendix I, section V.C.

16. A refusal to submit to a drug test required under 14 C.F.R. Part 121, appendix I, by the holder of a certificate issued under 14 C.F.R. Part 65 is grounds for the revocation of any certificate or rating issued under 14 C.F.R. Part 65.

The law judge's October 24 decision granted a motion filed by the Administrator for summary judgment on these allegations.⁴ On appeal, respondent, who in discovery essentially conceded the putative facts in the complaint, argues that the law judge erred by not holding a hearing on the issue of sanction. We see no error.

We have previously noted our strong agreement with the Administrator that revocation is appropriate sanction whenever a certificate holder undertakes to subvert the goals of applicable drug and alcohol testing regulations. Administrator v. Pittman, NTSB Order No. EA-4678 (1998)(reasonable suspicion alcohol testing). We there reasoned, "that an issue of lack of qualification would appear to inhere in every case in which" a refusal to submit to testing has been established. The law judge would thus have been justified in determining that no hearing was

⁴By Order served November 15, 2001, the law judge denied respondent's request for reconsideration.

necessary even if this case only involved the same "contempt...for authority and for a lawful and necessary condition on the right to exercise the privileges of an airman license" that was evident in Pittman. In fact it involved more. The respondent here did not just adulterate his urine sample to evade detection of his drug use. He also falsified a record concerning the condition of the sample he provided for the drug test he wanted to obstruct, by certifying that it had not been adulterated.⁵

In the context of this compound dishonesty, reflecting negatively on respondent's trustworthiness as well as his compliance disposition, it cannot be seriously argued that a hearing was required to determine whether he nevertheless possesses the care, judgment, and responsibility required of a certificate holder. Indeed, although cast as an objection to the law judge's decision not to hold a hearing, respondent's position more accurately appears to be a challenge to the law judge's assessment that respondent had not identified any factor that would justify a lesser sanction. We share that assessment.

The issue in this case is respondent's failure to cooperate with a lawful drug test requirement, not whether he is or was drug dependent. It is therefore of no consequence that he may be undergoing rehabilitative treatment to become drug-free. Moreover, we agree with the law judge that the propriety of revocation is not offset by respondent's formerly violation-free

⁵See paragraph 8 of the Emergency Order of Revocation. Although not separately charged here, we note that revocation is the usual sanction in falsification cases.

record or by his acknowledgement of misconduct during an investigation into the matter. While these factors may well be relevant to the Administrator in deciding whether to re-certificate respondent in the future, they do not demonstrate that revocation for the violation sustained was not justified, or that a hearing to take evidence respecting them was necessary.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The law judge's decision is affirmed.

BLAKEY, Chairman, CARMODY, Vice Chairman, and HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.